



Comptroller General
of the United States

Washington, D.C. 20548

M. H.
146012-16

Decision

Matter of: Adrian Supply Company

File: B-246207.2; B-246207.3

Date: March 13, 1992

Bob Stormberg for the protester,
Lt. Col. William H. Spindle, Maj. David R. Francis, and
Capt. Cheryl L. Hulon, Department of the Air Force, for the
agency.

Behn Miller, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Agency's failure to correct defective specification in response to protester's pre-bid opening clarification request does not provide basis for challenging cancellation of that portion of the solicitation where protester concedes that specification is defective and misled protester to supply a transformer type which will not serve agency's actual needs.

2. Protest that contracting agency improperly canceled remaining portion of solicitation is dismissed where record shows that even if protest were sustained, protester would not be in line for award.

DECISION

Adrian Supply Company protests the Department of the Air Force's cancellation of invitation for bids (IFB) No. F25600-91-B-0084, issued for 46 transformers.

We dismiss the protests.

The IFB was issued on July 31, 1991, as a brand name or equal solicitation and requested firms to provide prices for various quantities of four different transformer types; each transformer type constituted a separate line item which set forth a list of each transformer's salient characteristics as well as its manufacturer and corresponding part number. The solicitation permitted a single award or multiple awards to the responsible bidder or bidders whose bid, conforming to the solicitation, would be most advantageous to the government, considering only price and price-related factors as specified in the IFB.

On August 14, Adrian submitted four technical questions to the contracting officer which requested clarification of salient characteristics on several items. With regard to item No. 4, Adrian specifically asked:

"What type of transformer do you want, CSP
(completely self-protected) or conventional?"

On August 26, the Air Force issued amendment No. 0001 which answered all of Adrian's technical questions except with respect to item No. 4.

At the September 13 bid opening, 19 bids were received. On September 26, the contracting officer awarded a single contract to B&B Transformers Company as the apparent low, responsive bidder for the four line items. On October 10, Adrian protested the award to this Office; in its protest, Adrian contended that B&B intended to fulfill the requirements by providing remanufactured transformers, in contravention of the IFB's "New Materials" clause, Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.211-7013, which requires offerors--in the event they wish to bid remanufactured items--to notify the contracting officer in writing of this intent and obtain the contracting officer's approval to bid such items prior to bid opening. Since B&B had never complied with these procedural mandates, Adrian contended that the awardee's bid was nonresponsive.

On November 18, the Air Force notified this Office that the B&B contract was being terminated by means of a no-cost settlement. Specifically, after receiving Adrian's protest, the Air Force determined that, in fact, remanufactured transformers would satisfy its minimum needs and advised this Office that it would cancel the original IFB and resolicit the requirement using a revised specification permitting bids on remanufactured transformers. Since an agency's termination of an awardee's contract renders a protest against that award academic, by decision dated November 20, we summarily dismissed Adrian's protest.

On November 21, Adrian filed its second protest with our Office, challenging the Air Force's cancellation of the IFB as improper. As relief, Adrian requests that the IFB be reinstated and that Adrian receive contract award as the responsive bidder with the lowest aggregate price for all four line items.

Because of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed, a contracting agency must have a compelling reason

to cancel an IFB after bid opening. Federal Acquisition Regulation (FAR) § 14.404-1(a)(1) (FAC 90-5); Donco Indus., Inc., B-230159.2, June 2, 1988, 88-1 CPD ¶ 522. In this regard, where an invitation for bids does not contain specifications that reflect the agency's actual needs, the agency has a compelling basis for cancellation after bid opening. FAR § 14.404-c(1) (FAC 90-5); Environmental Safety Consultants, Inc., B-241714, Feb. 26, 1991, 91-1 CPD ¶ 213; Shetland Properties of Cook County Ltd. Partnership, B-225790.2, July 1, 1987, 87-2 CPD ¶ 2.

With regard to item No. 4, the Air Force asserts that cancellation was required since the essential salient characteristics description for this transformer item was inadequate; specifically, the Air Force maintains that this specification failed to advise offerors that a CSP type of transformer--as opposed to a conventional type of transformer--was required for the agency's actual needs.¹ The record shows that the CSP and conventional type of transformer are substantially different models; while the CSP transformer is an integrated system equipped with its own built-in circuit protection--comprised of a lightning arrestor, a weak link fuse and a circuit breaker--the conventional transformer does not contain any internal circuit protection and therefore requires external fuses, lightning arrestors or similar protection devices.

Adrian admits that the item specification--as written--did not adequately specify the agency's actual transformer requirement and that the conventional transformer which it bid will not serve the agency's actual needs.² Nevertheless, Adrian objects that cancellation of this item is improper because the Air Force failed to specify that a CSP transformer was required for item No. 4 when Adrian initially requested clarification of this issue on August 14. In essence, Adrian argues that the Air Force is now estopped from canceling this portion of the IFB. We do not consider this argument to be a valid basis of protest. See Bid Protest Regulations, 4 C.F.R. § 21.3(m) (1991).

Here, it is apparent that the Air Force should have more properly responded to Adrian's clarification request; however, a procuring agency is not precluded from canceling an invitation after bid opening simply because, prior to bid

¹A transformer converts distribution level voltage and current to desired usable quantities.

²Adrian concedes and the record otherwise confirms that the IFB's defective description of item No. 4 prevented the protester and other bidders from offering the exact item which the government required.

opening, it failed, as here, to correct an IFB deficiency. See Meds Mktg., Inc., B-213352, Mar. 16, 1984, 84-1 CPD ¶ 318.³ Thus, the Air Force was not precluded from reassessing the adequacy of the solicitation specification after bid opening. Id. Under these circumstances, where a clearly compelling basis for cancellation exists on the record, the agency's apparent error--in failing to detect and remedy the material deficiency prior to bid opening--does not estop or provide a basis for challenging the government's otherwise proper cancellation. See also Uni-Con Floors, Inc., B-193016, Apr. 19, 1979, 79-1 CPD ¶ 278.

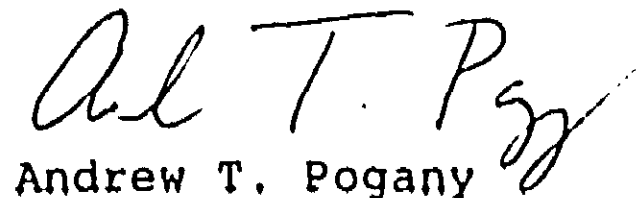
In this case, the solicitation, as stated above, permitted the agency to make multiple awards. Adrian asserts that even if we determine that cancellation with regard to item No. 4 was proper, this Office should nonetheless recommend that the agency make a partial award to Adrian for the aggregate of the remaining 3 items since the Air Force lacked a compelling basis to cancel this portion of the IFB. Here, the record shows that even if we were to find that the reasons upon which the Air Force based its cancellation determination for these three items are not sufficiently compelling to warrant cancellation, and accordingly recommend reinstatement of that portion of the IFB, another bidder--Nu Lite Electrical--rather than Adrian, would be in line for award since Nu Lite was the low, responsive bidder for the aggregate sum of these three items.⁴ Accordingly, since Adrian would not be in line for award even if its protest against the cancellation of items No. 1 through 3

³In supplemental comments to this Office, Adrian maintains that despite the language of the IFB, if given award, the firm will provide the CSP transformers which the Air Force requires for item No. 4 at its original bid price for the conventional transformer. However, a contracting agency may not award a contract competed under given specifications with the intention of significantly modifying its terms after award since such a procedure would be prejudicial to other bidders under the invitation and thereby have the effect of circumventing the competitive procurement statutes. A&S Mfg. Co., 53 Comp. Gen. 838 (1974), 74-1 CPD ¶ 240; American Television Sys., B-220087.3, June 19, 1986, 86-1 CPD ¶ 562.

⁴The solicitation provided that in the event of multiple awards, "\$500.00 would be the administrative cost to the Government for issuing and administering each contract awarded." Due to this administrative fee, the record shows that a single award based on Nu Lite's aggregate bid price of \$12,700 would be in line for award and would represent the most advantageous award approach as required by the solicitation.

were sustained, we dismiss Adrian's protest against the cancellation of these three items.⁵ See 4 C.F.R. §§ 21.0(a) and 21.1(a); Charles Redwood Ltd. Partnership, B-241050, Jan. 14, 1991, 91-1 CPD ¶ 32.

The protests are dismissed.



Andrew T. Pogany
Acting Assistant General Counsel

⁵In a separate protest to this Office dated December 4, Adrian alleges that the contracting officer acted in bad faith since he awarded the original contract to B&B despite that bidder's failure to include descriptive literature in its bid. We will not consider this allegation since Adrian has offered no more than mere speculation for a bad faith motive which can otherwise be reasonably interpreted as a procurement error on the part of the contracting officer; this error by itself does not meet our standard for proving bad faith or bias. See The Taylor Group, 70 Comp. Gen. 343 (1991), 91-1 CPD ¶ 306.